



UNIONS NOT LIABLE FOR NEGLIGENCE TOWARD THEIR MEMBERS WISCONSIN COURT DELARES

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Union organizers boast that “the union will have your back” if would-be members ever face discipline or termination at the hands of an unfair employer. During the organizing campaign, employees are told that they will have a “professional advocate,” in the form of a union representative, to vigorously represent their interests and ensure that they receive “just cause.” According to the union, the sacrifice of hundreds or thousands of dollars in annual union dues is well worth these “fundamental protections” promised by the union.

However, not all marketing slogans are completely truthful. Recently, a long term union employee learned just how poorly a union can treat its members and yet avoid liability for the harm it has caused. The employee’s story is described in a new decision from the Wisconsin Court of Appeals. That Court declared that, in Wisconsin, union members have no recourse against their union’s negligent failure to “protect the members’ back” after a wrongful termination.

Karen Bishop worked as an assistant for handicapped children for the Milwaukee Public School (“MPS”) district. She had 14 years of experience at the time events unfolded that would dramatically change her life. She and other MPS staff were represented by the Service Employees International Union (“SEIU”).

In February of 2004, Ms. Bishop was fired after allegedly pushing a child and failing to comply with attendance policies. Ms. Bishop complained that MPS had its facts wrong and that her termination was “without cause”.

On her own, she filed for unemployment. At the unemployment hearing the judge found that the MPS witnesses were “not credible,” and granted benefits to Ms. Bishop.

At the same time, she asked her Union to contest the termination. The SEIU filed a grievance on her behalf on March 18, 2004.

According to the labor agreement, MPS was required to respond to the various grievance steps within certain time limits. In the summer of 2004, the SEIU, without Ms. Bishop’s consent, agreed to waive the time limits for the MPS’ grievance response. (Such time limits are usually very important to employees who have lost their jobs, insurance, and other benefits and are seeking prompt resolution of their grievance and hopeful reinstatement to their jobs.)

In November of 2004, the SEIU informed Ms. Bishop that MPS had offered to reinstate Ms. Bishop without any back pay or benefits, and subject to 18 months of probation. Ms. Bishop objected to the offer, contending that the probation would simply allow MPS to look for other grounds to terminate her, and the lack of back pay left her without compensation for the financial losses she had suffered.

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After Ms. Bishop rejected the MPS offer, her relationship with the SEIU changed dramatically. The SEIU stopped communicating with her, failed to answer phone calls and failed to give her further information concerning the status of her grievance.

In January of 2005, the MPS finally sent the SEIU a formal response to Ms. Bishop's grievance (nearly a year after she was fired). The SEIU never sent a copy of the response to Ms. Bishop. (SEIU later claimed not to have received this response until a later date.)

For the next 6 months Ms. Bishop repeatedly phoned the SEIU but her calls were not returned.

In June of 2005, 16 months after her termination, Ms. Bishop finally received a call from a SEIU representative, who indicated that the SEIU had received Ms. Bishop's phone messages and that she would "be hearing from someone". No one contacted her.

In September of 2005, Ms. Bishop wrote the SEIU state president, with copies sent to the local SEIU officials, expressing her "frustration" with the process. She sent a second letter to the same parties later in the month. She received no response.

In October of 2005, a new local SEIU representative internally reviewed Ms. Bishop's grievance file. Without any discussion with Ms. Bishop or any attempt to interview witnesses, the SEIU rep determined that the SEIU was not going to pursue an arbitration of the discharge. Instead, the representative negotiated a modified settlement offer with MPS.

The new "offer" repeated many of the terms of the November, 2004 offer. However, the time period between the firing and Ms. Bishop's reinstatement was now referred to as an unpaid "disciplinary suspension" (Ms. Bishop was now unemployed for nearly two years). The offer now stated that Ms. Bishop could be "summarily discharged" for "any inappropriate conduct." Finally, the new proposal required Ms. Bishop to attend "anger management treatment". (Apparently the Union could not understand why Ms. Bishop was so angry at her predicament.)

Ms. Bishop had no role in the negotiation of the newest "offer".

The SEIU then sent a letter to Ms. Bishop telling her that: "Your grievance has been settled. Please make arrangements to sign the Agreement and return to work".

Understandably, Ms. Bishop refused to sign the agreement. She asked the SEIU to file for arbitration of her termination, but the Union refused.

In January of 2006, lacking any other recourse, Ms. Bishop retained her own counsel and filed a claim with the Wisconsin Employment Relations Commission ("WERC") against both the SEIU, claiming that it had violated its Duty of Fair Representation, and the MPS, alleging that it had wrongfully discharged her.

The WERC held that the Union had violated its obligation to Ms. Bishop and, because of this, it had jurisdiction to review her firing by MPS. The WERC then determined that Ms. Bishop had been wrongfully terminated and ordered her full reinstatement with back pay. The WERC ordered the SEIU to reimburse Ms. Bishop for her costs.

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One would have thought that such reimbursement would be the least that the SEIU could have offered Ms. Bishop, given its conduct toward its long term union member. Instead, the SEIU appealed, first to a circuit court, which affirmed the WERC, and next to the Wisconsin Court of Appeals.

The Wisconsin Court of Appeals decision was issued on August 24, 2010, over 6 years after Ms. Bishop was fired. The Court of Appeals held that, as a matter of law, a Union can act negligently toward its members and still avoid liability for the harm it causes, unless the Union member can somehow show that the Union acted “arbitrarily” or with “reckless disregard” of the Union member’s rights, if such reckless disregard “severely prejudiced” the Union member and only if “justice would not be served by protecting the Union from liability.”

The Court then held that Ms. Bishop had not established that the SEIU had acted in “reckless disregard” of her rights, even if it had been negligent, despite its waiver of the grievance deadlines, its failure to return her calls or communicate with her, its failure to send copies of the grievance response received from MPS, its refusal to interview witnesses, its refusal to take her case to arbitration, and its unauthorized settlement of her grievance.

The fact that Ms. Bishop had paid 14 years of union dues, or the fact that she suffered the loss of her job, her pay, her benefits and likely her self-image and reputation had no apparent bearing in the determination. Because the original WERC order for reinstatement and back pay for Ms. Bishop was conditioned on its finding that SEIU violated its duty of Fair Representation, which has now been overruled, it is possible that that reinstatement order could be voided. If that occurs, Ms. Bishop will be left without employment and without compensation for the past six years of legal battles she has been forced to undergo as a result of wrongful termination by her employer and negligence by her union.

Bottom Line: The decision in the Bishop case (Service Employees International Union Local No. 150 v. WERC, 09-1524 (Ct. App. 8/24/10) reflects remarkable legal protection shielding unions from liability for their own negligence.

The ruling stands in stark contrast to rules governing other types of agents such as attorneys, all of whom are generally liable to their clients for any harm resulting from any negligent acts.

It is little wonder that unions prefer not to allow employers the opportunity to provide rebuttal facts and information to their employees during organizing campaigns. Over the past few years, unions have been lobbying for the Employee Free Choice Act (“EFCA”). That Act would, among other things, severely restrict and even fine employers for disseminating information to employees during organizing campaigns.

The Bishop case should be used by employers to illustrate the dangers of the EFCA, as well as the risk employees assume upon joining a union. A review of the case might cause employees to question the union’s claims of “professional advocacy” or the value of the hundreds and thousands of dollars they pay in union dues for such “advocacy”. The case should become a valuable tool in an employer’s effort to remain union-free.